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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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TRANS WORLD AIRLINES, INC.,  
*Petitioner & Cross-Respondent,*  
v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED AND  
MCGREGOR, SWIRE AIR SERVICES LIMITED,  
*Respondents & Cross-Petitioners.*

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On Writ Of Certiorari To The United States  
Court Of Appeals For The Second Circuit

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**BRIEF AMICUS CURIAE OF AIR TRANSPORT  
ASSOCIATION OF AMERICA  
IN SUPPORT OF PETITIONER  
TRANS WORLD AIRLINES, INC.**

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	PAGE
TABLE OF CONTENTS	
I. INTEREST OF THE AMICUS CURIAE, AIR TRANSPORT ASSOCIATION OF AMERICA . . . .	2
II. SUMMARY OF ARGUMENT . . . . .	5
III. ARGUMENT . . . . .	8
A. The Warsaw Convention, to Which the United States Adhered and Pledged Faithful Support in 1934, Is a Comprehensive Treaty Which Prescribes Rules of International Carriage by Air and Establishes a Liability Regime for Cargo and Passengers. . . . .	8
B. The Decision Below Refusing to Enforce Article 22 of the Convention Is an Abrogation of a Treaty and Thus an Invasion of the Constitutional Prerogatives of the Executive and Legislative Branches of the Government. It Also Ignores Established Principles of Treaty Construction and Fails to Uphold the Intent of the Parties to the Treaty. . . . .	12

1. The Constitu-  
tion Places the  
Treaty Power, In-  
cluding the Power  
of Abrogation for  
Other Than Consti-  
tutional Reasons,  
in the Executive  
and Legislative  
Branches of Govern-  
ment, Not in the  
Judicial. . . . . 13
2. It Is the Function  
of Courts to Con-  
strue Treaties  
Liberally to Effect  
the Intention of the  
Parties on the Basis  
of the Treaty Itself,  
the Negotiating His-  
tory, and the Conduct  
of the Parties Sub-  
sequent to Ratifica-  
tion. . . . . 17
3. It Is Clear From  
Article 22 of the  
Convention, the  
Intent of the Par-  
ties Who Developed  
the Convention, and  
the Subsequent  
Actions of the Par-  
ties to It, That the  
Convention Is Expected  
to Limit Liability at  
a Reasonably Uniform  
and Stable Level.  
That Basic Intent

	and Expectation Must Be Honored by This Court. . . .	26
4.	Conversion of the Poincaré Franc Into U. S. Dollars on the Basis of the Last Official Price of Gold or the SDR Is Permissible Under the Conven- tion and Would Com- port With the Expec- tations of the Par- ties to the Conven- tion. . . . .	33
C.	The Repeal of the Par Value Modification Act Does Not Sanction a Refusal to Enforce Article 22 of the Con- vention. . . . .	41
1.	The Decision Below Is Based on a Mis- conception of the Legal Effects of the Repeal. . . . .	42
2.	Conversion of the Poincaré Franc into U. S. Dollars on the Basis of the Last Official Price of Gold Is Not Precluded by the Repeal. . . . .	47

D.	If the Decision Below Refusing to Apply a Critical Article of the Convention Is Upheld, the United States Will Have Failed to Honor Its Commitment to Other Nations and May Have Seriously Jeopardized a Widely Subscribed and Beneficial Treaty As Well As Its Own Leadership Role in International Aviation. If Those Risks Are to Be Taken on Other Than Constitutional Grounds, the Executive and Legislative Branches of Government Must Make That Decision. . . . .	54
IV.	CONCLUSION . . . . .	59

v.

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
Adams Express Co. v. Croninger, 226 U.S. 491 (1913) . . . . .	52
Asakura v. Seattle, 265 U.S. 332 (1924) . . . .	20
Boston & Maine R.R. v. Hooker, 233 U.S. 97 (1914) . . . . .	52
Cook v. United States, 288 U.S. 102 (1933) . .	44
Day v. TWA, 528 F.2d 31 (2d Cir. 1975) . . . . .	22, 26
De Geofroy v. Riggs, 133 U.S. 258 (1890) . . . .	16, 19
Doe, ex dem. Clark v. Braden, 57 U.S. (16 How.) 635 (1835) . . . .	15, 46
Eck v. United Arab Airlines, Inc., 360 F.2d 804 (2d Cir. 1966)	21, 24, 49
Factor v. Laubenheimer, 290 U.S. 276 (1933) . .	20
Foster v. Neilson, 27 U.S. (2 Pet.) 415 (1829) . .	17

## TABLE OF CITATIONS - Continued

Page

Franklin Mint v. Trans World Airlines, Inc., 525 F. Supp. 1288 (S.D.N.Y. 1981), 690 F.2d 303 (2d Cir. 1982)	2,4,35, 41-43,45-49,56,59
Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258 (D.C. Cir. 1980) . . . . .	27
Herman v. Northwest Airlines, Inc., 222 F.2d 326 (2d Cir.), <u>cert. denied</u> , 350 U.S. 843 (1955). . . . .	52
Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972), <u>aff'd per curiam</u> , 485 F.2d 1240 (2d Cir. 1973) . . . . .	27
Jordan v. Tashiro, 278 U.S. 123 (1928) . . . .	20
Kimball v. Callahan, 590 F.2d 768 (9th Cir.), <u>cert. denied</u> , 444 U.S. 826 (1979). . . . .	44
Maximov v. United States, 299 F.2d 565 (2d Cir. 1962), <u>aff'd</u> , 373 U.S. 49 (1963)	23-24,48-49

## TABLE OF CITATIONS - Continued

	Page
Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) . .	44
Missouri v. Holland, 252 U.S. 416 (1920) . . . .	21
Nielsen v. Johnson, 279 U.S. 47 (1929). . . . .	19-20, 22, 48
Pigeon River Improvement Slide and Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1934) . .	16, 44, 46
Taylor v. Morton, 2 Curtis 454 (C.C.D. Mass. 1855), <u>aff'd</u> , 67 U.S. 481 (1863)	15
Terlinden v. Ames, 184 U.S. 270 (1902). . . . .	16, 46
Tishman & Lipp, Inc. v. Delta Air Lines, Inc., 413 F.2d 1401 (2d Cir. 1969) . . . . .	52
Tucker v. Alexandroff, 183 U.S. 424 (1902) . .	20
United States v. Lee Yen Tai, 185 U.S. 213 (1902)	43-44
Vogelsang v. Delta Air Lines, Inc., 302 F.2d 709 (2d Cir. 1962). . .	52

## TABLE OF CITATIONS - Continued

	Page
Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) . .	44
Weinberger v. Rossi, 642 F.2d 553 (D.C. Cir. 1980), <u>reversed and</u> <u>remanded</u> , 50 U.S.L.W. 4354 (March 31, 1982) .	26-27
Whitney v. Robertson, 124 U.S. 190 (1888) . . . .	15, 46
<u>Constitution, Statutes, Rules</u> <u>&amp; Legislative Materials</u>	
U. S. Const. . . . .	12-14, 16, 47
art. II, sec. 2 . . . .	13-14
art. VI . . . . .	17
Airline Deregulation Act of 1978, 92 Stat. 1744, 49 U.S.C. §1551 (Supp. V 1981) . . . . .	50
Federal Aviation Act sec. 1002(j), 94 Stat. 40-42, 49 U.S.C. §1482(j) (Supp. V 1981) . . . .	51
sec. 1102, 94 Stat. 42, 49 U.S.C. §1502 (Supp. V 1981) . . . . .	51

## TABLE OF CITATIONS - Continued

	Page
Par Value Modification Act, P. L. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act, P. L. 93-110, 87 Stat. 352 (1973), repealed by Bretton Woods Agreements Act, P. L. 94-564, 90 Stat. 2660 (1976) . . . . .	6, 41-42, 44-45, 48-49
Senate Executive Calendar, Item 1, Executive B, 91-1 . . .	53
<u>Treaties and International</u> <u>Agreements</u>	
Additional Protocol With Reference to Article 2, October 29, 1934, 49 Stat. 3025 . . . . .	11
Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, 44 CAB 819 (1966) ("Montreal Agreement").	30, 38

TABLE OF CITATIONS - Continued

	Page
Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. 876 ("Warsaw Convention") .	<u>passim</u>
art. 3 . . . . .	9
art. 11 . . . . .	11
art. 18 . . . . .	10
art. 22 . . . . .	<u>passim</u>
art. 22(1) . . . . .	30
art. 22(4) . . . . .	35
art. 23 . . . . .	34
art. 25 . . . . .	10
art. 28 . . . . .	10
Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591 ("Chicago Convention")	
Preamble . . . . .	5
Detailed Report of the U.S. Delegation on International Conference on Air Law, International Civil Aviation Organization, Montreal, Sept. 1975 . . . . .	40

## TABLE OF CITATIONS - Continued

	Page
Guatemala City Protocol (1971), <u>reprinted in</u> <u>A. Lowenfeld, Aviation</u> <u>Law, Documents Supplement</u> <u>at 975-984 (2d ed. 1981)</u> ("Guatemala Conference")	25, 31-32, 38
2 Montreal Proceedings. .	30
Montreal Protocols No. 3 and No. 4 (1975), <u>reprinted in A. Lowenfeld,</u> <u>Aviation Law, Documents</u> <u>Supplement at 985-1001</u> (2d ed. 1981) ("Montreal Conference"). . . . .	25, 32, 39, 57
Proclamation of President Franklin D. Roosevelt declaring U.S. adherence to the Warsaw Convention, 49 Stat. 3000, T.S. 876 (1934). . . . .	11
Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, <u>done at the Hague,</u> <u>Sept. 28, 1955,</u> 478 U.N.T.S. 371 ("Hague Conference"). . . . .	28-29, 37

## TABLE OF CITATIONS - Continued

	Page
Report of the 21st Session of the Legal Committee, Montreal, 3-22 October 1974, Doc 9131-LC/173-2, LC/Work- ing Draft No. 846-12 . . .	39
Report of the 25th Session of the Legal Committee, Montreal, 12-25 April 1983, Doc 9397-LC/185 . . . . .	58
Second International Confer- ence on Private Aeronauti- cal Law, Minutes, October 4-12, 1929, Warsaw (Horner and Legrez trans. 1975) ("Warsaw Minutes") . . . . .	34-35
The Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969) ("Vienna Conven- tion") . . . . .	26, 57
art. 18 . . . . .	58
art. 31(3) . . . . .	26, 39
art. 60(2) . . . . .	56
art. 60(3) . . . . .	56
 <u>Administrative Materials</u>	
53 DEPT. STATE BULL. 923 (Dec. 6, 1965) . . . . .	30
54 DEPT. STATE BULL. 580 (April 11, 1966) . . . . .	30
CAB Order 74-1-16, Jan. 3, 1974 . . . . .	51

## TABLE OF CITATIONS - Continued

	Page
<u>Miscellaneous</u>	
Asser, <u>Golden Limitation of Liability in International Transport Conventions and the Currency Crisis</u> , 5 <u>Journal of Maritime Law and Commerce</u> 645 (1974). . . . .	33, 36
Barlow, <u>Article 22 of the Warsaw Convention: In a State of Limbo</u> , 8 <u>Air Law</u> 2 (1983). . .	33-34, 37
Boyle, <u>The Guatemala Protocol to the Warsaw Convention</u> , 6 <u>Calif. Western International L.J.</u> 41 (1975). . . . .	28-30, 32
Calkins, <u>Hiking the Limits of Liability at the Hague</u> , <u>Proceedings of the Am. Soc'y of Int'l L.</u> 120 (1962). . . . .	29
Letter from Secretary of State Wm. P. Rogers to the President (October 18, 1971), S. Exec. Doc. L. 92d Cong., 1st Sess. . .	26
A. Lowenfeld, <u>Aviation Law</u> , (2d ed. 1981) . . . . .	27-28, 32-33, 37, 40

## TABLE OF CITATIONS - Continued

	Page
Lowenfeld and Mendelsohn, <u>The United States and the Warsaw Convention</u> , 80 Harv. L. Rev. 497 (1967). . . . .	27-30
C. Shawcross and K. Beaumont, <u>Air Law</u> (2d ed. 1951) . . . . .	9
Ward, <u>The SDR in Transport Liability Conventions: Some Clarification</u> , 13 Journal of Maritime Law and Commerce 1 (1981)	40

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ON WRIT OF CERTIORARI TO THE  
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FOR THE SECOND CIRCUIT

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BRIEF AMICUS CURIAE OF AIR  
TRANSPORT ASSOCIATION OF AMERICA  
IN SUPPORT OF PETITIONER  
TRANS WORLD AIRLINES, INC.

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The Air Transport Association of  
America ("ATA") as amicus curiae sup-  
ports the position taken by Trans World  
Airlines, Inc. ("TWA") on the review by

this Court of the Decision of the United States Court of Appeals for the Second Circuit, 690 F.2d 303 (2d Cir. 1982). In accordance with Rule 36(2) of this Court, counsel for Petitioners and Respondents have given their written consent for ATA to file this brief as amicus curiae.

I. INTEREST OF THE AMICUS CURIAE, AIR TRANSPORT ASSOCIATION OF AMERICA

ATA is a non-profit, unincorporated association of federally licensed airlines.<sup>1/</sup> Twenty-nine ATA member airlines

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<sup>1</sup>ATA's members include Air California, Air Canada, Air Florida, Alaska Airlines, Aloha Airlines, American Airlines, Best Airlines, Braniff International, Capitol International Airways, Continental Airlines, CP Air, Delta Airlines, Eastern Air Lines, Evergreen International Airlines, Federal Express, The Flying Tiger Line, Frontier Airlines, Hawaiian Airlines, Midway Airlines, Muse Air, Northwest Airlines, Ozark Air Lines, Pan American World Airways, Piedmont Airlines, Pacific Southwest Airlines, Republic Airlines,  
(Continued next page)

provide scheduled domestic air transportation. Fifteen of them provide scheduled foreign air transportation to some 68 foreign countries. Two of the Association's associate members, Air Canada and CP Air, are foreign air carriers engaged in international air transportation to many points in the world including 11 points in the United States. All of the ATA members provide transportation of passengers or cargo which is subject to the terms of the almost universally subscribed Warsaw Convention,<sup>2/</sup> which as-

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<sup>1</sup> (Continued from previous page)  
Trans World Airlines, United Airlines, USAir, Western Airlines and Wien Air Alaska.

<sup>2</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. 876 (referred to herein as "Warsaw Convention" or "Convention").

sures a uniform, facile and predictable commercial relationship between air carriers and the traveling and shipping public in international air transportation.

The refusal of the United States Court of Appeals for the Second Circuit to enforce (prospectively) Article 22 of the Convention, on non-constitutional grounds, is the issue presented in this case. This issue in turn raises a constituent question as to the continued existence of a proper basis for converting judgments under the Convention into local currencies. ATA is concerned about the impact that the refusal to apply the liability limitations set forth in Article 22 would have on all of its air carrier members, including those who were not before the court in the Franklin Mint case. ATA is also concerned over the

impact that abrogation of a key provision of the Convention by the Judicial Branch of the U. S. Government would have on other international agreements and conventions critical to the safe and orderly future development of international aviation.<sup>3/</sup>

## II. SUMMARY OF ARGUMENT

Under the Constitution and decisions of this Court, the power to make or abrogate treaties rests with the Executive and Legislative Branches of government and not the Judicial Branch. Courts may abrogate treaties only on Constitutional grounds. See infra pp. 12-17.

Decisions of this Court also require that treaties be construed liberally to

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<sup>3</sup>See Preamble, Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591.

uphold the intentions and shared expectations of the sovereign parties to them, gleaned from the negotiating history and subsequent actions of the parties. See infra pp. 17-26.

The parties to the Warsaw Convention intended, when the treaty was drafted in 1929 and in subsequent protocols, that Article 22 impose a stable limit in both cargo and passenger cases at a level measured by the official price of gold. See infra pp. 26-41.

The refusal of the court below to uphold Article 22 prospectively ignores the principles of treaty construction enunciated by this Court. It is based solely on the repeal by Congress of the Par Value Modification Act ("Par Value Act") in 1976, abolishing the official price of gold in the United States, which

makes no mention of the Convention, either in the Public Law itself or in its legislative history. If the decision below is to stand, this Court must conclude (1) that Congress abrogated Article 22 sub silentio, contrary to its numerous decisions, or (2) that the court below was justified in abrogating the provision based on its belief that it was free to do so because Congress regarded the official price out of touch with economic and monetary reality for other purposes. If the court's action is not viewed as an act of abrogation it must be regarded as an impermissible, attempted reservation to Article 22. See infra pp. 10-11; 44-47.

In keeping with the intent of the parties, the Poincaré franc should be converted into local currencies on the

basis of the last official price of gold, or the SDR. See infra pp. 33-41.

Refusal of the United States to enforce Article 22 would be a material breach of the Convention. Such a breach could erode the near universality of the Convention, since many parties regard a stable limit as the sine qua non to their participation. See infra pp. 54-60.

### III. ARGUMENT

- A. The Warsaw Convention, to Which the United States Adhered and Pledged Faithful Support in 1934, Is a Comprehensive Treaty Which Prescribes Rules of International Carriage by Air and Establishes a Liability Regime for Cargo and Passengers.

The Warsaw Convention is a treaty comprised of a number of interdependent provisions. Insofar as it pertains to cargo, the subject matter involved in the instant case, the Convention establishes

uniform documentation requirements which supersede otherwise confusing and sometimes inequitable local requirements around the world. Absent these provisions both shippers and airlines would be uncertain as to whether the documents reflecting their commercial transactions run afoul of one or more of these local requirements.<sup>4/</sup> Articles 3 and 11 were adopted to avoid such a possibility. The resulting uniformity has permitted the development of airline agreements which make it possible to ship cargo anywhere in the world on a single air waybill.

With a few exceptions, the Convention makes carriers liable for loss, damage, destruction or delay of international cargo by creating a rebuttable

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<sup>4</sup>See C. Shawcross and K. Beaumont, Air Law, 40 n.(e) (2d ed. 1951) at 71.

presumption (Article 18); establishes a limit on liability in all save exceptional circumstances (Articles 22 and 25); and specifies the jurisdiction within which claims may be prosecuted (Article 28). These provisions also limit significantly the maze of conflicting legal theories of liability, philosophies of recompense, and conflicts of laws problems that otherwise would have to be dealt with on an ad hoc basis by courts of nations with different legal systems.<sup>5/</sup>

In order to assure that the treaty is kept intact as a whole instrument, the Convention's single reservation provision

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<sup>5</sup> A similar regime establishing liability and documentation rules and imposing limits on recoveries applies in the case of passengers.

is very restrictive, authorizing a reservation by a sovereign party only with regard to international air transportation performed directly by the state.<sup>6/</sup>

The United States played no role in developing the original Convention. However, in proclaiming U. S. adherence to the Convention on October 29, 1934, President Roosevelt pledged:

" . . . that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America . . . subject to the reservation aforesaid." Proclamation of President Franklin D. Roosevelt declaring U. S. adherence to the Warsaw Convention. 49 Stat. 3000, T.S. 876 (1934) (underscoring added).

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<sup>6</sup> See Additional Protocol With Reference to Article 2. 49 Stat. 3025.

This restrictive reservation provision is looked to by most parties as a guarantee that no participant will attempt to abrogate the limitations on liability.

This proclamation of effectiveness was issued by the President after receiving the advice and consent of the Senate, and after depositing the instrument of adherence in July of 1934. It therefore bespeaks the expectation of the Executive and Legislative Branches of the United States Government that this nation will honor all Articles of the Convention.

- B. The Decision Below Refusing to Enforce Article 22 of the Convention Is an Abrogation of a Treaty and Thus an Invasion of the Constitutional Prerogatives of the Executive and Legislative Branches of the Government. It Also Ignores Established Principles of Treaty Construction and Fails to Uphold the Intent of the Parties to the Treaty.

The court below declared Article 22 of the Convention prospectively unenforceable. It did not find that Article 22 or any other article of the treaty violates the Constitution; nor did it

give proper heed to principles of treaty construction recognized by this Court in discerning and following the intent of the parties to treaties. It amounts to an abrogation of a cornerstone provision of this half-century old treaty and thus of the treaty as a whole, on non-constitutional grounds, in defiance of its acceptance in toto by the Executive and Legislative Branches of Government.

1. The Constitution Places the Treaty Power, Including the Power of Abrogation for Other Than Constitutional Reasons, in the Executive and Legislative Branches of Government, Not in the Judicial.
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The Constitution of the United States entrusts treaty-making to the Executive and Legislative Branches of Government. Article II, Section 2, of the Constitution provides:

"[The President] shall have the Power, by and with the Advice and

Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . ."

No role is specified for the Judiciary.

This does not mean that a treaty is above the Constitution, that Constitutional constraints can be circumvented by entering into a treaty or that courts have no role to play in determining whether a treaty measures up to the requirements of the Constitution. However, it does mean that the Judicial Branch is not a forum in which to urge abrogation of a treaty provision on other than Constitutional grounds.

This Court's recognition of the limited role of the Judiciary in reviewing treaties is well established. In 1853 it made a clear pronouncement of the limited circumstances in which the Judiciary may disregard a treaty provi-

sion. In Doe, ex dem. Clark v. Braden,  
57 U.S. (16 How.) 635 (1853), it said:

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms." 57 U.S. (16 How.) 657.

Whitney v. Robertson, 124 U.S. 190, 194-95 (1888) recognized that decisions regarding treaties involve diplomatic considerations unsuited to the Judiciary:

". . . the power to determine these matters [a promise contained in a treaty] had not been confided to the judiciary, which has no suitable means to exercise it, but to the Executive and Legislative Departments of our Government; and that they belong to diplomacy and legislation, and not to the administration of the laws. . . ." 124 U.S. 195.<sup>7</sup>

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<sup>7</sup>This opinion agreed with Taylor v. Morton, 2 Curtis 454, 459 (C.C.D. Mass. 1855), aff'd, 67 U.S. 481 (1863).

Similar pronouncements have been made by this Court in Terlinden v. Ames, 184 U.S. 270 (1902); and Pigeon River Improvement Slide and Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1934). See De Geofroy v. Riggs, 133 U.S. 258 (1890).

We are unaware of any instance in which this Court has departed from its consistent recognition of the limited role of courts in abrogating treaty provisions; nor, we respectfully submit, would the Constitution permit it. In short, unless a provision of a treaty violates the Constitution, or a subsequent Act of Congress specifically contradicts or supersedes it, the courts have no charter to refuse to observe the treaty, that being the prerogative of the other branches of Government. Protestations of dissatisfaction with a treaty on

non-constitutional grounds should be addressed, not to the courts, but to the other branches.

2. It Is the Function of Courts to Construe Treaties Liberally to Effect the Intention of the Parties on the Basis of the Treaty Itself, the Negotiating History, and the Conduct of the Parties Subsequent to Ratification.

Not only are the courts not free to second guess the President and Congress as to the wisdom of a treaty's provisions, their charge is to uphold it as the law of the land<sup>8/</sup> and to observe the

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<sup>8</sup>U.S. Const. art. VI.

As Chief Justice Marshall said in *Foster v. Neilson*, 27 U.S. (2 Pet.) 415 435 (1829):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the Aid of any legislative provision."

(Continued next page)

intentions of the parties to it. To do this, courts must construe treaty provisions liberally in order to effect the apparent intentions of the parties. In doing so, courts should look to the deliberations of the parties in negotiating and drafting the treaty, and must take cognizance of the subsequent conduct of the parties.

This Court recognized the need for a liberal construction of treaties in order to uphold them and implement the intent of the parties almost a hundred years ago

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<sup>8</sup>(Continued from previous page)  
The Warsaw Convention is just such a self-executing treaty, as pointed out by the Solicitor General in the Brief for the United States as Amicus Curiae on Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, at 10-11.

in De Geofroy v. Riggs, supra. As stated in that decision:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties .... As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended." 133 U.S. 272 (underscoring added).

More recent decisions of this Court have made the point even more forcefully. In Nielsen v. Johnson, 279 U.S. 47 (1929), this Court emphasized the need for more liberal construction in the case of treaties than is sometimes required in construing statutes of the same legislative body:

"The narrow and restricted interpretation of the treaty contended for by respondent, while permissible and often necessary in construing

two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. . . ." 279 U.S. 51-52 (underscoring added).<sup>9/</sup>

In Nielsen, this Court also recognized the need to look to the deliberations of the parties in negotiating a treaty and to their own practical construction of it, saying:

"When [a treaty's] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it." Id. at 52 (court's citations omitted).

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<sup>9</sup>The same principle has been enunciated a number of times in other cases: Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. Seattle, 265 U.S. 332, 342 (1924); Tucker v. Alexandroff, 183 U.S. 424, 437 (1902).

The Second Circuit itself recognized the importance of a practical construction of the Warsaw Convention in Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2d Cir. 1966).

In construing treaties so as to uphold their provisions as the parties intended, American courts have also recognized the need to take cognizance of changed circumstances which may not have been foreseen by the parties. Mr. Justice Holmes, speaking for this Court in Missouri v. Holland, 252 U.S. 416 (1920), said:

"[W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." 252 U.S. 433.

Recognition that a treaty has  
"called into life a being the development

of which could not have been foreseen completely" underscores the need, noted by this Court in Nielsen, to take into account the practical construction of the treaty by the parties. To do so requires due regard for their shared expectations, as gleaned from their actions in the years following ratification. As the Second Circuit said in Day v. TWA, 528 F.2d 31 (2d Cir. 1975):

"For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787."

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"The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions.<sup>10</sup>" 528 F.2d 35-36.

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<sup>10</sup>The Court continued:

"See Pigeon River Improvement Slide & Boom Co. v. Cox, 291 U.S. 138, 158-63, 54 S. Ct. 361, 78 L.Ed. 695 (1934); Husserl v. Swiss Air Transport Co., [485 F.2d 1240 (2d Cir. (Continued next page)

By upholding another decision of the Second Circuit, Maximov v. United States, 299 F.2d 565 (2d Cir. 1962), aff'd, 373 U.S. 49 (1963), this Court lent further support to the need for practical interpretations in order to respect the intent and "shared expectations" of the contracting parties. In Maximov the Second Circuit said:

"The basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into agreement, in order to construe the document in a manner consistent with that intent. Rocca v. Thompson, 223 U.S. 317, 331-332, 32 S.Ct. 207, 56 L.Ed. 453; Restatement, The Foreign Relations Law of the United States § 129 (Tent.Draft No. 3, 1959). And

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<sup>10</sup> (Continued from previous page) 1973)]; Harvard Research, Article 19; M. McDougal, H. Lasswell and J. Miller, The Interpretation of Agreements and World Public Order 56, 58 (1967); II. C. Hyde, International Law 72 (1922); Vienna Convention Art. 31(3).<sup>13</sup>/" (Court's footnote omitted).

to give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties, it is necessary to examine not only the language, but the entire context of agreement. We must therefore examine all available evidence of the shared expectations of the parties . . . ." 299 F.2d 568.

The importance of construing treaties to honor the intent of the contracting parties and their shared expectations, particularly in situations in which circumstances have changed since the treaty was drafted, was pointed out by the Second Circuit in Eck, supra, at 812 n.18:

"The principles of interpretation set out in the text are of a general applicability. They would seem, however, to have a special relevance when it is a treaty that must be interpreted, for the language of such a document is less likely to be modified in the light of changing conditions than is the language passed by a legislative body that convenes regularly. Cf. Kolovrat v. Oregon, 366 U.S. 187, 192-194, 81 S.Ct. 922, 6 L. Ed.2d 218 (1961)."

This observation pinpoints one of the practical problems that would be posed by upholding the decision below, i.e., the difficulty of securing prompt revision (negotiation, ratification, and bringing into force) of the treaty.<sup>11/</sup>

Adhering to the foregoing principles of treaty construction, as enunciated by this Court and the Second Circuit, thus requires that account be taken of the intention of the parties to the Convention as revealed by their deliberations in 1929 and by their subsequent actions in considering protocols to the Convention and in making other interim

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<sup>11</sup>E.g., this U. S. effort to update the Convention began in 1966. The Guatemala Protocol which has been subsumed by Montreal Protocols 3 and 4 was opened for signature in 1971. To date the Montreal Protocols have been ratified by only a handful of nations and are still pending before the U. S. Senate. See infra p. 53 n.39.

arrangements. See Article 31(3), Vienna Convention on the Law of Treaties [8 I.L.M. 679 (1969)] ("Vienna Convention").<sup>12/</sup> It also calls for a liberal construction of Article 22, if need be, in order to uphold it.

3. It Is Clear From Article 22 of the Convention, the Intent of the Parties Who Developed the Convention, and the Subsequent Actions of the Parties to It, That the Convention Is Expected to Limit Liability at a Reasonably Uniform and Stable Level. That Basic Intent and Expectation Must Be Honored by This Court.
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The language of the Convention limiting recoveries is clear as is the in-

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<sup>12</sup>The United States has not ratified the Vienna Convention; however, as Secretary of State Rogers wrote President Nixon in 1971, urging its transmittal to the Senate, "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law practice." S.Exec. Doc. L.92d Cong., 1st Sess. See also: Day v. TWA, 528 F.2d 36; Weinberger v. Rossi,

(Continued next page)

tention of the parties to preserve such a limit. Article 22 of the Convention provides that "in the transportation of. . . goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram. . . ." <sup>13/</sup> On their face these words establish a limit. The intent to do so is manifested by the deliberations of the parties who drafted the Convention, and reinforced by their subsequent actions. <sup>14/</sup>

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<sup>12</sup> (Continued from previous page)  
642 F.2d 553 (D.C. Cir. 1980), reversed and remanded, 50 U.S.L.W. 4354, 4355 n.5 (March 31, 1982); Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); and Husserl v. Swiss Air Transport Co., 351 F.Supp. 702, 707 (S.D.N.Y. 1972), aff'd per curiam, 485 F.2d 1240 (2d Cir. 1973).

<sup>13</sup> Warsaw Convention, art. 22, para. (2).

<sup>14</sup> A. Lowenfeld, Aviation Law (2d ed. 1981) ("Lowenfeld"); Lowenfeld and Men-  
(Continued next page)

On at least four occasions since the Convention came into force, the parties have considered revisions or alterations to it. In no instance does any of the changes proposed or made raise any doubt that the parties, including the United States, continue to support a limit and expect that it will be observed. In all cases where changes have been considered and made, the United States Government played a major role, often a controlling one.<sup>15/</sup>

Even though the United States did not ratify the Hague Protocol of 1955,

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<sup>14</sup>(Continued from previous page)  
 delsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967) ("Lowenfeld and Mendelsohn"); and Boyle, The Guatemala Protocol to the Warsaw Convention, 6 Calif. Western International L.J. 41 (1975) ("Boyle").

<sup>15</sup>Lowenfeld, §§4, 5, and 6 at 7-98 et seq.; and Boyle at 42 n.4.

it was a significant force behind many of the changes that were made.<sup>16/</sup> None of those changes disturbed the fundamental premise of Article 22 -- liability was to be limited.

Since 1955, the Executive Branch has been consistently striving to update the Convention. Revisions sponsored by the United States have always included a significant increase of the limit for passenger cases, but have never suggested abandoning the limit. In that vein, using denunciation as an instrument of its diplomacy, the United States drove a

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<sup>16</sup>See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at the Hague, Sept. 28, 1955, 473 U.N.T.S. 371. Calkins, Hiking the Limits of Liability at the Hague, Proceedings of the Am. Soc'y of Int'l L. 120, 124 (1962); Lowenfeld and Mendelsohn at 532; and Boyle at 42.

hard bargain with its Convention partners in the mid-60's. Thus, President Johnson served notice of denunciation on November 15, 1965. That notice was withdrawn on May 13, 1966 -- the eve of its effectiveness.<sup>17/</sup> The withdrawal was occasioned by a provisional arrangement taking the form of an agreement (in accordance with Article 22(1) of the Convention) among the principal international airlines flying to and from the United States, waiving the passenger limit up to US\$75,000 (the "Montreal Agreement").<sup>18/</sup>

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<sup>17</sup> 53 DEPT. STATE BULL. 923-24 (December 6, 1965); 54 DEPT. STATE BULL. 580 (April 11, 1966); and 2 Montreal Proceedings 175-178.

<sup>18</sup> Lowenfeld and Mendelsohn at 497. The agreement entitled "Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol" (Agreement CAB 18900) was approved by the Civil Aeronautics Board on May 13, 1966. 44 CAB Rept. 819 (1966). See Boyle at 47-49.

This interim arrangement does not address the cargo limits. However, it is another manifestation of the intention of the parties, and the U. S. in particular, to limit liability under the Convention, and it underscores the expectation that Article 22 would be observed by the nations which are parties to it.

The effort of the United States to achieve an increase in the passenger limit was pursued within the legal committee framework of the International Civil Aviation Organization ("ICAO")<sup>19/</sup> and at a diplomatic conference held at Guatemala City in 1971. The passenger limit was increased and provision was made for further automatic increases at

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<sup>19</sup>ICAO's legal committees are comprised of a cross-section of representatives of nations in the international aviation community, nearly all of which are parties to the Warsaw Convention.

future dates, but no action was taken to change the cargo limit. Again, it is clear from the Guatemala Conference that all participating parties, including the United States, affirmed the maintenance of a limit in both cargo and passenger cases.<sup>20/</sup>

The Montreal Diplomatic Conference of 1975 produced a number of changes (Montreal Protocol 4) in the cargo regime of the Convention and, as discussed below (pp. 39-41), changed the unit of account from the Poincaré franc to the SDR. The deliberations of the parties at the Montreal Conference, like those at the Guatemala Conference, leave no room for

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<sup>20</sup>Boyle at 65-72; and Lowenfeld, \$6.21 at 7-152.

doubting that all parties continue to expect Article 22 to limit recoveries.<sup>21/</sup>

4. Conversion of the Poincaré Franc Into U. S. Dollars on the Basis of the Last Official Price of Gold or the SDR Is Permissible Under the Convention and Would Comport With the Expectations of the Parties to the Convention.
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In reaching conclusions as to the intention of the drafting parties in the 1925 - 1929 period, it is important to bear in mind that international monetary arrangements were based on the so-called gold standard.<sup>22/</sup> This helps explain

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<sup>21</sup>Lowenfeld, §6.51 at 7-169.

<sup>22</sup>Each participating nation denominated its currency in terms of a specified amount of gold which it was obligated to give the bearer of its notes on demand. Asser, Golden Limitation of Liability in International Transport Conventions and the Currency Crisis, 5 Journal of Maritime Law and Commerce 645 (1974) ("Asser"); and Barlow, Article 22 (Continued next page)

some of the actions taken at the diplomatic conference in 1929.

A panel of legal experts<sup>23/</sup> had proposed including the following statement in Article 23 (the predecessor of Article 22): "[t]he values here above are gold values." The proposal was rejected.<sup>24/</sup> The Conference also refused to accept the suggestion that Article 22 refer simply to the French franc even though it was advised by the French delegate that, by parliamentary action, the

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<sup>22</sup> (Continued from previous page)  
of the Warsaw Convention: In a State of Limbo, 8 Air Law 2, 5 (1983) ("Barlow").

<sup>23</sup> Comité International Technique d'Experts Juridiques Aériens.

<sup>24</sup> Second International Conference on Private Aeronautical Law, Minutes, October 4-12, 1929, Warsaw, at 265 (Horner and Legrez trans. 1975) ("Warsaw Minutes").

franc had been stabilized in reference to gold.<sup>25/</sup>

As the opinion below recognized, selection of the Poincaré franc represented a compromise between the French and Swiss views, the latter being willing to accept reference to the French franc if it were a gold franc of specified gold content.<sup>26/</sup> The Swiss representative reasoned, and the Conference agreed, that with such a reference to gold the international value of recoveries would

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<sup>25</sup>Warsaw Minutes at 88-89.

<sup>26</sup>Article 22(4) provides that "[t]he sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into national currency in round figures."

Warsaw Minutes at 89-90; Franklin Mint, 690 F.2d 307.

be unchanged even if the Poincaré franc were altered by statute.

By using the gold franc, the parties were able to set the limit at a level comprehensible to all of them. Doing so facilitated a meeting of the minds as to the order of magnitude of the limitation on which they agreed.

From the beginning, the parties who drafted the Convention were concerned that wide fluctuations<sup>27/</sup> in the agreed level as a result of unilateral action taken by one of the contracting parties with regard to its own currency could impair the integrity of the treaty. As stated above, at no time since the Convention came into force has there been a deviation from this central objective of stability.

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<sup>27</sup> Asser at 663-64.

The action taken at the Hague Conference in 1955 reflects recognition by the participating parties that, when converted into local currencies, the level of recoveries might vary somewhat if the official price of gold changed as it had done in 1934 when it increased from \$20 an ounce to \$35 an ounce.<sup>28/</sup> However, acceptance of changes of this magnitude does not sanction the conclusion that Article 22 permits the agreed level to be rendered meaningless by judicial decrees (1) refusing to enforce the limit, as did the court below, or (2) converting judgments on the basis of the commodity value of gold, as urged by Franklin Mint. The former would disregard the intentions of the parties completely; the latter would

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<sup>28</sup> Barlow at 5-6. See Lowenfeld, \$4.11 at 7-99.

subject recoveries to wild fluctuations, at many times the agreed level, often as a result of events having nothing to do with the treaty or monetary policy.

The Montreal Agreement of 1966 (see supra pp. 29-31) did not involve cargo and its increased limit is denominated in U. S. dollars. It is, however, a continuing reflection of the intention of the United States to maintain a reasonably stable level of recoveries.

At the Guatemala Conference in 1971, all discussions regarding proposed increases in the passenger limitation (also contained in Article 22) were in terms of U. S. dollars. When the \$100,000 limit was agreed upon, it was converted into Poincaré francs on the basis of the official price of gold.

Later at the 1975 Montreal Conference<sup>29/</sup> most of the signatories to the

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<sup>29</sup> Preparatory work for the Montreal Conference was done through ICAO. An interpretative resolution, adopted by the Legal Committee without opposition in 1974, reveals the intention of the parties that the limits set in Article 22 be at a level determined by use of the official price of gold. The following paragraphs from the underlying submission make this clear, and are noteworthy in light of Article 31(3) of the Vienna Convention, supra:

"All the considerations mentioned above lead to the conclusion that the reference to gold in the conventions should be understood as a reference to the official value of gold. . . .

"The proposal contained in WD No. 848 is intended to assure that the gold franc clauses in the international air law conventions continue to be interpreted in the manner intended by the drafters of these conventions. It is only an interpretative clause, and is not intended to change or amend the conventions in any way." Report of the 21st Session of the Legal Committee, Montreal, 3-22 October 1974, Doc 9131-LC/173-2, LC/Working Draft No. 846-12.

Convention, led by the United States, had become convinced that the unit of account should be changed in order to assure that actual recoveries would be at or near the level they had intended.<sup>30/</sup> In choosing the SDR as the substitute for the Poincaré franc, the parties were reacting to the emerging changes in the international monetary system (and the reaction of the courts of some nations to those changes).<sup>31/</sup>

This action reflects the preference for the SDR as an easily convertible unit

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<sup>30</sup> Ward, The SDR in Transport Liability Conventions: Some Clarification, 13 Journal of Maritime Law and Commerce 1, 2 (1981).

<sup>31</sup> Detailed Report of the U. S. Delegation on International Conference on Air Law held under the auspices of the International Civil Aviation Organization, Montreal, September, 1975, p. 17. See Lowenfeld, §6.51 at 7-168.

of account for the long term. But it was also taken in anticipation of possible conversion of the Poincaré franc on the basis of the market price of gold which, in many cases, would amount to increasing the limitation to a level never intended by the parties or agreed to by them. And, important from the perspective of this case, the contemplated change was made by amending the treaty.

C. The Repeal of the Par Value Modification Act Does Not Sanction a Refusal to Enforce Article 22 of the Convention.

While the opinion below reveals an awareness of the objectives of the parties who designed the Convention and their actions subsequent to its coming into force (690 F.2d 306-309), it ignores the message of decided cases and fails to apply the principles of treaty construction set forth above (pp. 17-26).

Rather, the decision seems to turn entirely on the repeal of the Par Value Act and the court's notions of what that portends for Article 22.

1. The Decision Below Is Based on a Misconception of the Legal Effects of the Repeal.

We submit that the court below misconceives the import of the repeal. By acknowledging that Congress may not have focused "explicitly" on the Convention (690 F.2d 311), the court below apparently concedes that Congress did not make clear its intention to abrogate Article 22 when it repealed the Par Value Act. This seems to gainsay a previous pronouncement that the repeal was "an explicit abandonment of the previously established unit of conversion." Id.

However that apparent contradiction is resolved, this Court, if it is to sus-

tain the decision below, must conclude either (1) that Congress abrogated a critical provision of the Convention sub silentio; or (2) that the court below was justified in doing what Congress did not do on the basis of its own finding that Congress felt that the official value of gold did not comport with economic and monetary reality for other purposes. Id. at 309 and 311. Neither conclusion finds support in previous decision of this Court.

On a number of occasions, this Court has made clear that general language in a statute is not sufficient to nullify a treaty provision. In United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902), it said:

"Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the

whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty." 185 U.S. 221 (underscoring added).

Cook v. United States, 288 U.S. 102

(1933) makes the same point, as does

Pigeon River Improvement Slide and Boom

Co. v. Charles W. Cox, Ltd., 291 U.S. 138

(1934), in which this Court cautioned that ". . . the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." 291 U.S.

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If, as the Second Circuit's decision acknowledges, the statute repealing the Par Value Act fails to refer to the

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<sup>32</sup>See Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 690 (1979); and Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir.), cert. denied, 444 U.S. 826 (1979).

treaty and if, as is the case, the legislative history is devoid of any reference to it, the decisions of this Court discussed above will not permit the conclusion -- essential to upholding the lower court's decision -- that Congress has abrogated Article 22 of the Convention through silence. Nor do the precedents of this Court sanction the lower court's doing what Congress did not do<sup>33/</sup> because of its own finding that "[t]he repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with eco-

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<sup>33</sup>Permitting the court below to refuse to enforce a treaty on this basis amounts to empowering it to shift the burden to Congress to enact additional legislation to preserve the Convention when there is no indication that Congress intended the repeal of the Par Value Act to affect the treaty.

nomic and monetary reality." 690 F.2d 309. The court made no finding that the use of the last official price of gold was out of touch with the intention of the parties to the treaty. Nor could it.

In short, the court below simply refused to honor a treaty commitment. This is abrogation by the Judiciary. For the reasons set forth by this Court in previous cases, that action cannot stand.<sup>34/</sup>

The court below seems to believe that its refusal to enforce Article 22 prospectively does not constitute abrogation. We submit that there is no distinction between a refusal to enforce a cornerstone provision and outright abrogation of that provision. However, should

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<sup>34</sup> Doe, ex dem. Clark v. Braden, supra; Whitney v. Robertson, supra; Ter-Iinden v. Ames, supra; Pigeon River Improvement Slide and Boom Company v. Cox, supra. See supra pp. 14-17.

this Court conclude otherwise, the lower court's decision surely must be regarded as an attempted reservation to the Convention. As set forth above (pp. 10-11), the Convention does not permit a reservation other than the one specified. Hence the decision below cannot stand without violating the Convention. Nor could the Judicial Branch create a reservation to a treaty, even if the Convention permitted it, since the Judicial Branch is not permitted to engage in treaty-making by the Constitution.

2. Conversion of the Poincaré Franc into U. S. Dollars on the Basis of the Last Official Price of Gold Is Not Precluded by the Repeal.

The court below stated that it had no authority to accept any of the arguments made by the parties as to how the Poincaré franc could be converted into

dollars. It found a "devastating argument" against each of them. 690 F.2d 306.

In addition to misconceiving the impact of the repeal of the Par Value Act on Article 22, the court below erred in holding that it could not enforce Article 22 without "picking and choosing among alternative units of conversion" or selecting "a new unit of account." We agree that it is not the court's function to pick the unit of account or the level of the limitation. Nor is it necessary. That was done by the parties to the treaty. The court's function is to determine the intention of the parties and respect it.<sup>35/</sup> See supra pp. 17-41.

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<sup>35</sup>Nielsen v. Johnson, 279 U.S. 47 (1929); Maximov v. United States, (Continued next page)

Implicit in the decision below is the court's recognition that the parties intended the recoveries to be converted on the basis of the official price of gold, which it would have accepted as a matter of course had the Par Value Act not been repealed. But, as previously demonstrated, the repeal does not alter the court's obligation to respect the intention of the parties, absent a clear and specific action by Congress addressing the Convention.

Applying the injunctions of this court on treaty construction, in the absence of an official price, courts converting Poincaré francs into local currencies must do the next best thing in

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<sup>35</sup> (Continued from previous page)  
299 F.2d 565 (2d Cir. 1962), aff'd, 373 U.S. 49 (1963); Eck v. United Arab Airlines, 360 F.2d 804 (2d Cir. 1966).

order to honor the intention of the parties. In this case the next best thing is to base the conversion on a numéraire which would produce a result at or near the level they intended. The last official price meets these criteria. See supra pp. 33-41.

If it is believed that a legislative remedy is necessary to permit conversion on this basis, such action has already been taken by the Civil Aeronautics Board ("CAB"), the independent agency to which Congress has delegated rate-making authority and tariff supervision in the case of international air transportation.<sup>36/</sup> The CAB acting in a quasi-legislative

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<sup>36</sup>The Airline Deregulation Act of 1978, which contemplates the ultimate demise of the CAB, makes specific provision for the transfer of this function to the Department of Transportation. 92 Stat. 1744, 49 U.S.C. §1551 (Supp. V 1981).

capacity ordered all airlines to file tariffs setting forth the dollar limit of liability imposed by Article 22 of the Convention. CAB Order 74-1-16 (January 3, 1974).

The Board's Order which was based on the official price of gold is still in effect: the aforesaid tariffs must be filed and observed by international carriers as mandated by the Civil Aeronautics Board in accordance with Section 1002(j) of the Federal Aviation Act. 94 Stat. 40-42, 49 U.S.C. §1482(j) (Supp. V 1981). As a consistent reflection of a prevailing treaty and thus the requirements of Section 1102 of the Federal Aviation Act (94 Stat. 42, 49 U.S.C. §1502) (Supp. V 1981), these tariffs are

binding on air carriers and international shippers including Franklin Mint.<sup>37/</sup>

The Executive Branch, speaking through the Solicitor General, has added its voice in support of the limitation imposed by Article 22 and the use of the last official price of gold as the proper basis for converting the Poincaré franc. As the Solicitor stated:

"The court of appeals should have determined which of the proposed measures for translating the limits prescribed by the Convention into dollars best effectuated the intent of the framers." Brief for the United States as Amicus Curiae, supra p. 18 n.8, at 10.

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<sup>37</sup> Adams Express Co. v. Croninger, 226 U.S. 491 (1913); Boston & Maine R.R. v. Hooker, 233 U.S. 97 (1914); Herman v. Northwest Airlines, Inc., 222 F.2d 326 (2d Cir.), cert. denied, 350 U.S. 843 (1955); Vogelsang v. Delta Air Lines, Inc., 302 F.2d 709 (2d Cir. 1962); and Tishman & Lipp, Inc. v. Delta Air Lines, Inc., 413 F.2d 1401 (2d Cir. 1969).

Doing so, of course, would require use of the last official price, or the SDR.

A good case was made by TWA to the court below for using the SDR as a basis for conversion.<sup>38/</sup> Although the protocols using the SDR as the unit of account are still pending before the United States Senate for its advice and consent,<sup>39/</sup> a conversion made on that basis would reflect the intention of the parties to limit liability at a level not too different from that achieved by using the last official price. See supra pp. 39-41. Use of the SDR, like the last official price, would also avoid the wild fluctuations which would occur were the

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<sup>38</sup>Petition of TWA for Rehearing and Suggesting Rehearing In Banc, Oct. 12, 1982, at 10-12.

<sup>39</sup>Senate Executive Calendar, Item 1, Executive B, 91-1.

market price of gold to be used as Franklin Mint advocates.<sup>40/</sup>

- D. If the Decision Below Refusing to Apply a Critical Article of the Convention Is Upheld, the United States Will Have Failed to Honor Its Commitment to Other Nations and May Have Seriously Jeopardized a Widely Subscribed and Beneficial Treaty As Well As Its Own Leadership Role in International Aviation. If Those Risks Are to Be Taken on Other Than Constitutional Grounds, the Executive and Legislative Branches of Government Must Make That Decision.
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As previously set forth, the United States played no role in developing the original Convention. However, its adherence in 1934 was accompanied by a pledge to observe that Convention in good faith, and the United States has been the

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<sup>40</sup>As the Solicitor General pointed out "[t]he fluctuations induced by private speculation in gold have no place in the liability limitation regime of the Convention." Brief for the United States as Amicus Curiae, supra, p. 18 n.8, at 14.

prime mover of virtually all changes made or proposed for the Convention since it came into effect.

If the decision below is followed and becomes the law of the land, there is a good chance that many parties to the Convention might regard the decision as having the same practical effect as withdrawal from the entire Convention by the United States since, to many of them, an enforceable Article 22 is the sine qua non to their own participation. At a minimum, such a decision deeming Article 22 unenforceable would be widely construed as a material breach of the Convention which could give rise to collective or individual actions suspending or terminating the treaty vis-a-vis the

United States or all parties. Vienna Convention, Art. 60(2).<sup>41/</sup>

Thus, the decision below raises the spectre of some participating nations being tempted to return to the extremely low limits imposed by their own local laws -- limits which may be adequate to cover most of their citizens, but far less than the level believed essential for American passengers and shippers by the U. S. Government. In short, since the Convention, as interpreted in the decision below, would not fulfill their expectations of limiting liability in American courts, some nations would have

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<sup>41</sup>Article 60(3) defines "the violation of a provision essential to the accomplishment of the object or purpose of the treaty" as a material breach. Article 22 of the Warsaw Convention, establishing the limits on liability, is just such a provision.

little reason to continue to abide by the Convention and every justification under customary international law (as reflected in the Vienna Convention) to decline to do so.

The Executive and Legislative Branches of the U. S. Government have recognized the importance of guarding against such a contingency. This is manifested by U. S. adherence to the Convention, including the Montreal Protocols, and its continuing support for ratification of those pending protocols. In April 1983, at a meeting of the ICAO Legal Committee attended by delegations of 53 member nations, one non-member nation and five international organizations, the U. S. Delegation reaffirmed that the Executive Branch "has supported and does

support ratification of these Protocols."<sup>42</sup>/ Report of the 25th Session of the Legal Committee, Montreal, 12-25 April 1983, Doc 9397-LC/185. This reaffirmation was, of course, consistent with the declaration of the Solicitor General in the Brief for the United States as Amicus Curiae, supra p. 18 n.3, at 2: "The United States remains committed to the Convention as the basic instrument governing questions of liability in the international aviation industry."

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<sup>42</sup> Article 18 of the Vienna Convention specifically requires states which have signed a treaty to "refrain from acts which would defeat the object and purpose of [that] treaty. In the case at hand, the United States has signed, but not yet ratified, the Montreal Protocols. If the decision of the court below stands, the United States will have taken an action which defeats a fundamental object and purpose of those protocols -- maintenance of a limit of liability in international air transportation.

In its role of leadership in seeking modernization of the Convention, the United States has led its treaty partners to believe that it would stand by the limits imposed by Article 22, and the Convention as a whole, until it is updated. If the decision below is allowed to stand, those treaty partners may well doubt the verity of this American commitment. This would place the credibility of the United States at risk, and by doing so, could mortgage the U.S. leadership role in developing other critical international aviation agreements.

#### IV. CONCLUSION

This Court should uphold the decision below to the extent that it applied the limits established by Article 22 in the instant dispute and converted the

Poincaré franc into United States dollars on the basis of the last official price of gold. It should reverse that decision's further holding that Article 22 of the Warsaw Convention limiting recoveries for loss, damage or delay of cargo is prospectively unenforceable.

Respectfully submitted,

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